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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 30, 1988

QUESTIONS PRESENTED

1. May persons affected by court-approved consent decrees containing race-conscious relief challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

2. Did the Court of Appeals err by remanding this case to the district court with instructions to apply "heightened scrutiny" above and beyond the standards established by this Court for evaluating race-conscious relief under Title VII rather than affirming the district court's decision that the decrees are lawful remedial devices?

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants *

Richard Arrington
City of Birmingham

Personnel Board Defendants *

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors (Petitioners here)

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

* The City Defendants and the Personnel Board Defendants are filing separate petitions for *certiorari*. All of the petitions rely upon one Appendix, which is being filed herewith.

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OTHER AUTHORITIES:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners John W. Martin, *et al.*, respectfully pray that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 15, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987) (App. at 3a-24a).[1] The initial opinion of the district court

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1 The form of citations is as follows: the Appendix to this Petition is cited as "App. at "; exhibits to the 1985 trial are cited as "PX " (plaintiffs' exhibit) or "DX " (defendants' exhibit); the transcript and exhibits from the 1979 trial were admitted in the 1985 trial as DX 1979 and DX 1980 respectively and are cited as "1979 trial PX " or "[month] 1979 tr. "; and the record in the Court of Appeals is cited as "R[volume]-[document number]-[page]".

is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985) (App. at 27a-66a); the district court's additional findings (App. at 69a-76a) are not reported.[2]

JURISDICTION

The opinion of the Court of Appeals was filed on December 15, 1987 (App. at 3a). The Court of Appeals denied petitions for rehearing and suggestions of rehearing in banc in an order dated January 25, 1988 (App. at 25a).

This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. §§ 1254(1) & 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Fifth and Fourteenth Amendments to the United States Constitution and § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). They are set forth at pages 1a to 2a of the Appendix.

STATEMENT OF THE CASE

Birmingham's employment practices have now been subjected to more than fourteen years of discrimination litigation and, if the decision of the Court of Appeals is not reversed, the litigation will continue for many more. This litigation had its genesis in 1974 when John W. Martin, *et al.* (defendant-intervenors in this case below and petitioners here) commenced an employment discrimination action against the City of Birmingham (the "City"), the Jefferson County Personnel Board (the

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2 The district court's findings are found in four places in the record: the trial transcript (App. at 27a-36a); Defendants Richard Arrington, Jr., the City of Birmingham and Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law (App. at 37a-66a); Plaintiffs' and United States' Motion to Amend Judgment (App. at 69a-74a); and the district court's January 6, 1986 order (App. at 75a-76a). For the Court's convenience, we have combined these findings at pages 77a to 109a of the Appendix.

"Personnel Board") and others. After seven years of costly litigation that included two trials, an appeal and a petition for *certiorari*, that litigation was settled in 1981 through court-approved consent decrees providing race-conscious relief. When, pursuant to those decrees, the City promoted blacks to supervisory positions for the first time in its history, white employees commenced separate "reverse discrimination" actions challenging the decrees' race-conscious relief on the same grounds that the district court had considered—and rejected—before entering the decrees in 1981. Seven more years of litigation have ensued, and no end is in sight.

A. Birmingham's History of Discrimination.

This Court is no stranger to the pervasive and egregious racial discrimination of Birmingham, Alabama. As Chief Justice Warren observed:

> "The attitude of the [City of Birmingham] in general and of its Public Safety Commissioner in particular are a matter of public record, of course, and are familiar to this Court from previous litigation. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *In re Shuttlesworth*, 369 U.S. 35 (1962). The United States Commission on Civil Rights found continuing abuse of civil rights protestors by the Birmingham police, including use of dogs, clubs and firehoses." *Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting).

The lower courts too have repeatedly found the City and the Personnel Board guilty of unlawful racial discrimination in a wide variety of contexts. *See Ensley Branch, NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir.) (discriminatory employment examinations), *cert. denied*, 449 U.S. 1061 (1980); *Johnson v. Yeilding*, 165 F. Supp. 76, 79 (N.D. Ala. 1958) (City's job announcements for "whites only"); *Armstrong v.*

Board of Educ., 333 F.2d 47 (5th Cir. 1964) (segregated public schools); *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969) (racially restricted public cemeteries); *Woods v. Florence*, No. CV 82-PT-2272-S (N.D. Ala. Jan. 31, 1985) (statute governing Personnel Board was passed and maintained with an intent to discriminate).[3]

The consent decrees at issue here arose from the City's discrimination in public employment. In the 1950's, the City's job announcements for positions in the classified service (which are the more desirable public jobs) expressly said "white only". App. at 31a-32a, 39a-40a, 85a; *see also* 1979 trial PX 7 at 49, 69, 76, 82 (announcements for Fire and Engineering Departments). Although the City stopped using "white only" job announcements in 1958 (*see Johnson*, 165 F. Supp. at 79), discrimination continued. For example, the City did not hire a black firefighter until 10 years later in 1968.[4] 1979 trial PX 28 at 4. The City did not hire any other black firefighters until 1974, although during that time it hired 187 whites. 1979 trial PX 1 at 121-25. By 1976, only 8 of the City's 404 firefighters (2%) were black, and by 1981 only 9.1% were black. DX 1431 (Exhibits 3, 5). In the Engineering Department between 1965 and 1970, fewer than 5% of the classified employees were black, less than 17% in 1976, and by 1982 only 20%. PX 23 at 9. In the City's classified service generally, blacks occupied fewer than 1% of those positions in 1966 and no more than 25% by 1976. *Id.* at 2-3. In contrast to the dearth of black employees in the classified service, the City's civilian labor force was 24.3% black in 1960 and 49.9% black in 1980. *Id.* at 1-2.

3 The City's history of racial discrimination is so well known that it is the proper subject of judicial notice. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979).

4 Although the reverse discrimination cases involve most of the City's departments, the cases in the Fire and Engineering Departments were tried first and are the subject of this Petition. Accordingly, we will discuss primarily the evidence of discrimination in those two departments.

As for promotional positions, the number of blacks in the supervisory positions at issue here—fire lieutenant, fire captain and engineer—was "the inexorable zero" (*see International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)) until after the 1981 entry of the consent decrees at issue in this litigation. Several practices had prevented blacks from being promoted. First, just to be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (all of whom were white), and black employees received "failing" scores four times more often than did white employees. 1979 trial PX 70 at 7. Second, there were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry level positions, in 1979 only 8% of blacks, compared to 70% of whites, met those requirements. DX 1431 at 155-64. Third, entry level examinations in the Fire and Police Departments were held to discriminate against blacks,[5] promotional examinations were shown by extensive evidence to have had an adverse impact on blacks, and none of the examinations has ever been shown to be job related.[6] *See* App. at 242a-243a. Finally, one "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in the classified service (PX 1 at 23-24), a practice that discriminated against blacks because they had been excluded from the classified service. *See* 1979 trial PX 67, PX 147.

The consent decrees were designed to remedy this discrimination. Therein lies the irony of this reverse discrimination litigation. For years, the City of Birmingham fought to maintain its practices of segregation. Its violent response to peaceful civil rights marchers prompted the passage of the Civil Rights Act of 1964, including Title VII. *See* B. Schlei &

5 *See Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. Jan. 10, 1977), *aff'd*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

6 *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971) (requiring selection procedures with an adverse impact on minorities to be job related).

P. Grossman, *Employment Discrimination Law* viii-ix (2d ed. 1983). Yet now that the City of Birmingham has sought to remedy its unfortunate past practices and to advance the policies of Title VII, its efforts have been subjected to this endless reverse discrimination litigation.

B. The Litigation Leading to the Consent Decrees.

In 1974, two actions—*John W. Martin, et al. v. City of Birmingham, et al.*, and *Ensley Branch, NAACP v. George Seibels, et al.*—were commenced alleging unlawful employment discrimination by the City, the Personnel Board and others. In 1975, the United States commenced *United States v. Jefferson County, et al.*, alleging that the City and the Personnel Board, among others, had engaged in a pattern and practice of discrimination against blacks and women. The cases were consolidated.

A trial was held in 1976 concerning only two of the many examinations at issue—the entry level examinations for firefighter and police officer. The district court concluded that those examinations had an adverse impact on blacks and were not job related under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), and the court ordered the Personnel Board to certify to the City as eligible for promotion specified ratios of blacks and whites. The former Fifth Circuit affirmed, and this Court denied *certiorari*. *See Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. Jan. 10, 1977), *aff'd in pertinent part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

In 1979, a second trial, lasting 8 trial days, was held concerning certain other employment and promotional practices. At that trial, the plaintiffs introduced substantial evidence of discrimination, including evidence that the City had hired no black firefighters until 1968, that it still employed very few black firefighters by 1979 and that it used promotional practices that had prevented any blacks from being promoted in the Fire Department. *See, e.g.*, 1979 trial PX 28 at 4; Aug. 1979 tr. at 639-40; 1979 trial DX 360; 1979 trial PX 29 at 6-7; 1979 trial PX 70 at 7. After the trial but before the district court announced its decision, the parties entered into settlement negotiations, and in 1981 the plaintiffs and the United States jointly

entered into two consent decrees—one with the City (App. at 122a-201a) and the other with the Personnel Board (App. at 202a-235a).

The decrees together provide commitments to affirmative action goals and procedures to implement those goals. The Personnel Board Decree, *inter alia*, (1) prohibits the Board from using discriminatory selection procedures (Board Decree ¶ 1; App. at 204a-205a), (2) requires the Board to endeavor to develop job related selection procedures that will have little or no adverse impact on blacks or women (*id.* ¶ 3; App. at 205a), (3) prohibits the Board from using promotional potential evaluations in departments where they have had an adverse impact on blacks (*id.* ¶¶ 9-12; App. at 207a-208a), (4) reduces or eliminates time-in-grade requirements (*id.* ¶¶ 13(a)-(c); App. at 208a-209a), (5) requires, "[s]ubject to the availability of qualified black applicants", the Personnel Board to certify to the City as eligible for promotions sufficient numbers of blacks for the City to meet the goals in the City Decree (*id.* ¶¶ 23-24; App. at 213a-215a) and (6) requires the Personnel Board to comply with the certification provisions of the 1977 order (*id.* ¶ 7; App. at 206a-207a).

The City Decree, *inter alia*, (1) establishes, "subject to the availability of qualified applicants", long term goals for blacks and women approximately equal to their percentages in the Jefferson County civilian labor force (City Decree ¶ 5; App. at 125a-126a), (2) establishes interim annual goals ranging from 25% to 50% for blacks and 15% to 30% for women "[i]n order to achieve the long term goal . . . and subject to the availability of qualified black applicants" (*id.* ¶¶ 6-9; App. at 126a-130a), (3) requires the City to ask the Personnel Board to selectively certify as eligible for promotion qualified blacks and women when necessary to meet the goals (*id.* ¶ 10; App. at 130a), (4) reduces or eliminates certain time-in-grade requirements (*id.* ¶¶ 19-23; App. at 133a-134a), (5) eliminates promotional potential ratings in departments where they have had a demonstrated adverse impact on blacks (*id.* ¶¶ 24-25; App. at 134a-135a) and (6) requires the City to take other actions to encourage the recruitment and promotion of blacks and women.

Both decrees provide that "[r]emedial actions and practices required by the terms of, or permitted to effectuate and

carry out the purposes of, this Consent Decree shall not be deemed discriminatory within . . . the provisions of 42 U.S.C. 2000e-2(h), (j)". City Decree ¶ 3 (App. at 125a); Board Decree ¶ 2 (App. at 205a). The decrees also provide that any party thereto may move to dissolve them after six years if their purposes have been substantially achieved. City Decree ¶ 55 (App. at 150a); Board Decree ¶ 55 (App. at 228a).

Notice inviting "*all persons who have an interest which may be affected by the Consent Decrees*" to appear at a fairness hearing was given by publication in two local newspapers and by mail to the members of the minority and female subclasses. City Decree ¶ 48a (App. at 146a-147a, 171a-192a) (emphasis in original); Board Decree ¶ 45a (App. at 222a-223a). A fairness hearing was held on August 3, 1981, at which various objectors appeared—some arguing that the proposed race-conscious relief was unlawful, and others that the relief was not sufficient. Among the objectors was the Birmingham Firefighters Association ("BFA") and two of its members, who were represented by Mr. Fitzpatrick, counsel for the reverse discrimination plaintiffs here. The district court heard Mr. Fitzpatrick's argument that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment, and the court offered him the opportunity to present evidence, which he declined. *See* DX 1431 at 10-23. After "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised", the district court approved the decrees. *See United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981), *aff'd on other grounds*, 720 F.2d 1511 (11th Cir. 1983); App. at 236a-249a. Mr. Fitzpatrick's clients sought to intervene after the fairness hearing, but their motion was denied as untimely and that decision was affirmed on appeal. *Id.*

C. The Reverse Discrimination Litigation.

When, pursuant to the decrees, the City endeavored to promote blacks to the position of fire lieutenant for the first time in the City's history, competing white applicants (represented by Mr. Fitzpatrick) commenced the first of these reverse discrimination cases and sought to enjoin those promotions. *Bennett, et al. v. Arrington, et al.*, No. 82-P-8508 (N.D. Ala.);

App. at 110a-121a. Their application for an injunction was denied, and that decision was affirmed on appeal. *See United States v. Jefferson County*, 720 F.2d 1511, 1519-20 (11th Cir. 1983). Additional actions were also commenced concerning promotions in several of the City's other departments,[7] and the cases were consolidated before Judge Pointer, the judge who had presided over the earlier litigation and who fortuitously was assigned randomly the first reverse discrimination case. Since then, with nearly every promotion of a black, an EEOC complaint has been filed, and to date 41 persons have complaints pending in this reverse discrimination litigation. If the City had made promotional decisions as advocated by the reverse discrimination plaintiffs, it would still not employ *any* black fire lieutenants, fire captains or civil engineers—the inexorable zero would pertain today.

The decrees provide that the parties must defend the lawfulness of actions required by or permitted to effectuate the purposes of the decrees. City Decree ¶ 3 (App. at 125a); Board Decree ¶ 2 (App. at 205a). Accordingly, John W. Martin, *et al.*, the plaintiffs in the earlier litigation, intervened in these actions as defendants to do so. R15-8; R16-7; R17-13; R17-24. The United States, though a party to the decrees (indeed, the Justice Department had drafted them), intervened or realigned in these actions as a *plaintiff* and *challenged* many of the promotions of blacks made pursuant to the decrees. R11-54-14; R15-29; R16-42; R17-52. Protracted discovery began, and 141 depositions were taken.

A five day trial was held in December 1985 concerning only the promotions of blacks in the Fire and Engineering

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7 *Birmingham Ass'n of City Employees, et al. v. Richard Arrington, Jr.*, No. CV82-P-1852-S (N.D. Ala.) (Engineering Department) (R16-1); *William L. Garner, et al. v. City of Birmingham, et ano.*, No. 82-M-1461-S (N.D. Ala.) (Streets and Sanitation Department); *Robert K. Wilks, et al. v. Richard Arrington, Jr., et al.*, No. CV83-AR-2116-S (N.D. Ala.) (Fire Department) (R17-1); *Peter J. Zannis, et al. v. Richard Arrington, Jr., et al.*, No. CV83-AR-2680-S (N.D. Ala.) (Police Department).

Departments.[8] During that trial, defendants introduced 75 exhibits, including the complete records from the 1976 trial (DX 1976, DX 1977), the 1979 trial (DX 1979, DX 1980) and the fairness hearing (DX 1431), and adduced even further statistical evidence (*e.g.*, PX 23, DX 2210, DX 2213) and testimony (*e.g.*, R4-496; R6-819 to 22; R6-825 to 27; R6-888 to 90; DX 2241 at 191-92) of discrimination. The district court held that the plaintiffs' claims were impermissible collateral attacks on the consent decrees and, alternatively, that the remedial relief provided by the consent decrees was lawful. App. at 61a-62a, 65a, 106a-107a, 109a. Plaintiffs timely appealed, and defendants timely cross-appealed the denial of attorneys' fees.[9] The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

D. The Decision Below.

A divided panel of the Eleventh Circuit reversed the district court's dismissal of the private plaintiffs' claims. The majority (Tjoflat and Henderson, J.J.) reversed the district court's ruling that collateral attacks on consent decrees were impermissible; it overlooked, however, the district court's alternative holding that the consent decrees were in any event lawful remedial devices under Title VII and the Equal Protection Clause and remanded for consideration of that issue. App. at 12a-20a. The panel affirmed the dismissal of the United States's claims, holding that as a party to the decrees, the United States was estopped from challenging the City's actions in a collateral proceeding. App. at 20a. Judge Anderson dissented, arguing that the City should not be liable for back pay but that the private plaintiffs could seek prospective relief. App. at 21a-24a.

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8 The cases in the Police and Streets and Sanitation Departments were stayed pending the completion of the first trial. R12-127.

9 The Court of Appeals did not consider defendants' cross-appeal for attorneys' fees. If the decision of the Court of Appeals is reversed, as we believe it should be, defendants' cross-appeal would be ripe for decision.

REASONS FOR GRANTING THE WRIT

I. CONSENT DECREES PROVIDING RACE-CONSCIOUS RELIEF SHOULD NOT BE SUBJECT TO COLLATERAL ATTACK BY PERSONS WHO HAD NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE COURT APPROVED THOSE DECREES.

A. This Court Should Grant *Certiorari* to Resolve the Question Presented But Left Open in *Marino v. Ortiz*.

Last term, this Court granted *certiorari* in *Marino v. Ortiz* to consider precisely the first question presented here—whether a consent decree containing race-conscious relief may be collaterally attacked by persons who had notice and the opportunity to be heard but did not intervene.[10] In *Marino*, the Court affirmed, by an equally divided vote, the decision of the Second Circuit barring such a collateral attack on a Title VII consent decree. 108 S. Ct. 586 (1988), *aff'g* 806 F.2d 1144 (2d Cir. 1986). In this case, the Eleventh Circuit's decision is contrary to the decision that this Court affirmed in *Marino*. Now that the Court enjoys a full complement of nine members, petitioners urge that a writ of *certiorari* be granted so that this important question may be resolved.

B. This Court Should Grant *Certiorari* to Reconcile the Conflict Among the Courts of Appeals With Respect to the Question Whether Title VII Consent Decrees May Be Collaterally Attacked.

The First, Second, Fourth, Fifth, Sixth and Ninth Circuits have held that a Title VII consent decree may not be collaterally attacked by a person who had notice and the opportunity to be

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10 The petitioners in *Marino* were a group of white police officers who claimed that they had not been placed on the list of persons eligible for a promotion even though they had scored at least as high on the examination as the lowest scoring minority officer promoted under an interim order leading to the consent decree. Although they appeared at the hearing to oppose the decree, they chose not to move to intervene but instead commenced a collateral lawsuit before the court's entry of the consent decree.

heard in opposition to its entry. *See Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981). In contrast, in 1982 the Eleventh Circuit acknowledged the Ninth Circuit's holding in *Dennison* but said "[w]e do not follow this path [prohibiting collateral attacks] to the extent that it deprives a nonparty to the decree of his day in court to assert violation of his civil rights." *Jefferson County*, 720 F.2d at 1518 & n.17. Since the Court granted *certiorari* in *Marino*, the split has sharpened: in this case, the Eleventh Circuit definitively held (where the plaintiff did have an earlier opportunity to his day in court, but did not avail himself of it) that nonparties may collaterally attack consent decrees (App. at 12a-17a); and in *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986), the Seventh Circuit reached the same conclusion. The Court should grant *certiorari* to reconcile this significant conflict between six circuits, on the one hand, and two circuits, on the other.

C. The Court Should Grant *Certiorari* to Resolve This Important Question of Federal Law.

The Court is familiar with this issue from its very recent consideration of *Marino*. Accordingly, we will only summarize the reasons why this question of federal law is so important that it should be settled by this Court.

First, these consent decrees—like many decrees containing race-conscious relief—were approved by a federal court only after notice to interested persons and a hearing. To permit collateral attacks on consent decrees containing race-conscious relief is to treat them as nothing more than voluntary affirmative action plans. The Eleventh Circuit in this case did precisely that (App. at 19a), notwithstanding that the race-conscious relief at issue here was obtained after two trials, a finding of discrimination and a fairness hearing at which the district

court "reviewed with care" objections to the decrees and held that the remedial relief was lawful under the precedents of this Court and of the Eleventh Circuit. *See* App. at 236a-246a.

Second, permitting collateral attacks on a decree containing mandatory injunctive relief, as the decrees do here, creates the risk of imposing inconsistent obligations on the employer. A consent decree, unlike a voluntary plan, is a court order, the violation of which is punishable by contempt. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3076 n.13 (1986) ("*Local 93*"). The City could not defy the consent decree and later defend against contempt by arguing that the order was unlawful. *See Walker*, 388 U.S. at 315-21. For that reason, the City should not be held liable in a collateral proceeding for complying with a consent decree embodying race-conscious relief.[11]

Third, allowing collateral attacks on decrees where persons affected had notice and the opportunity to be heard would permit relitigation of issues that already have been, or could have been, litigated.[12] The challenge to the decrees by the reverse discrimination plaintiffs in this collateral proceeding is no different than the objections raised by their attorney, Mr. Fitzpatrick, at the fairness hearing, objections which the district court expressly considered and rejected. *See* App. at 240a-245a.

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11 Furthermore, as Judge Anderson noted below in dissent (App. at 22a-23a), the EEOC's Affirmative Action Guidelines, which "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" (*Local 93*, 106 S. Ct. at 3073, quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), interpret "Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII". 29 C.F.R. § 1608.8 (1986).

12 The reverse discrimination plaintiffs here certainly had notice and the opportunity to be heard. All were employed by the City at the time of the fairness hearing in 1981. *See* R5-604; PX 139-59, 168-75, 180-97 (charts showing seniority as of May 1982). Moreover, all of the Fire Department plaintiffs were members of the BFA (R11-23-43; R13-218-3), which was represented by Mr. Fitzpatrick at the fairness hearing, and, as the Eleventh Circuit recognized in *Jefferson County*, "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected". 720 F.2d at 1516.

Fourth, collateral attacks waste precious judicial resources. Here, the Court of Appeals remanded this case for the district court to decide what it has already decided twice before—whether the consent decrees are lawful remedial devices. If that decision is not reversed, the district court will have to decide that same issue every time the City promotes a black or a woman pursuant to the decrees—a nonsensical result. And this scenario would be repeated in each of the dozens of affirmative action consent decrees nationwide.

Fifth, allowing collateral attacks would undermine the authority of the federal courts to issue judgments, for "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute". *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D. Pa.), *aff'd without opinion*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *see also Thaggard*, 687 F.2d at 69.

Finally, permitting collateral attacks by persons who chose not to be heard before the entry of the decree would have the perverse effect of destroying the incentives to settle Title VII claims. *See Dennison*, 658 F.2d at 696; *Thaggard*, 687 F.2d at 69. A collateral lawsuit would threaten the benefits each party receives by settling— relief for plaintiffs and repose for defendants. Destroying those incentives would directly contravene Congress's policy that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 86-89 (1981); *Local 93*, 106 S. Ct. at 3072; 29 C.F.R. § 1608.1(b) (EEOC Affirmative Action Guidelines).

II. THIS COURT SHOULD GRANT *CERTIORARI* TO CORRECT THE ELEVENTH CIRCUIT'S MISAPPLICATION OF THIS COURT'S DECISIONS IN *JOHNSON V. TRANSPORTATION AGENCY* AND *UNITED STEELWORKERS OF AM. v. WEBER*.

The district court has twice considered the lawfulness of the consent decrees' race-conscious relief and has twice held that the decrees do not violate the rights of nonminority

employees—first in 1981 when that court approved the decrees, and again in 1985 in this very case when it considered and rejected the reverse discrimination plaintiffs' claims. Both times the court correctly applied the standards for evaluating the lawfulness of race-conscious relief under Title VII enunciated by this Court in *Weber*, 443 U.S. 193, and reaffirmed in *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987).

Although the Court of Appeals held that the plaintiffs could collaterally challenge the 1981 ruling, it inexplicably overlooked the 1985 ruling in this very proceeding that the decrees' race-conscious relief is lawful. Instead, the Court of Appeals focused on the district court's alternative holding in 1985 that collateral attacks are not permissible and remanded to the district court with instructions that the decrees should be subjected to "*heightened scrutiny* under the second prong of the *Johnson* analysis" (App. at 20a (emphasis added)). That standard, however, is nowhere found in *Johnson*; indeed, it conflicts with this Court's decisions in *Weber* and *Johnson*. This Court should grant *certiorari* to correct the misinterpretation of *Johnson* by the Court of Appeals and to prevent that misinterpretation from being applied by the Eleventh Circuit and the other lower federal courts.

A. The Court of Appeals Overlooked that the District Court Correctly Held that the Remedial Race-Conscious Relief in the Consent Decrees Is Lawful.

When the district court held the consent decrees' race-conscious relief to be lawful in 1985 and rejected plaintiffs' reverse discrimination claims, it correctly applied the factors for reviewing affirmative action plans articulated by this Court in *Weber*. App. at 61a-62a, 106a-107a. *Weber* was reaffirmed in *Johnson*, and nothing that this Court said in *Johnson* casts doubt on the district court's decision.

In *Weber*, this Court approved an affirmative action plan that overrode seniority and set aside for minority employees 50% of the openings in a training program. The Court did so for two reasons: (1) there were "manifest racial imbalances in traditionally segregated job categories" (443 U.S. at 197); and (2) the plan did not "unnecessarily trammel the interests of the white employees" (*id.* at 208). This Court expressly reaffirmed

those factors in *Johnson*. 107 S. Ct. at 1451-52. *Johnson* not only explicitly approved *Weber*'s holding that the 50% ratio was lawful, but also expanded *Weber* by making clear that to show a "manifest imbalance", the proponents of race-conscious relief need not prove a *prima facie* case of unlawful discrimination. *Id.* at 1452.

The district court has twice applied the two factors enunciated in *Weber* and reaffirmed in *Johnson*.[13] With respect to the first *Weber* factor—imbalance—the district court in 1981 found that "[e]mployment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City—that . . . the effects of past discrimination against blacks persist". App. at 243a. The district court concluded that there was "more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would in time be held liable for discrimination". App. at 244a. In 1985, the district court found that "blacks were seriously underrepresented in City employment", including the Fire Department, and that "similar underrepresentation continues even with the actions taken under the consent decree to this day". App. at 31a-32a, 39a-40a, 85a.

With respect to trammeling—the second *Weber* factor—the district court in 1981 found that the race-conscious relief does "not preclude the hiring or promotion of whites and males

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13 The second time, in this action in 1985, the district court held that "[t]he City Decree is lawful" and that

> "[u]nder all the relevant case law of the Eleventh Circuit and the Supreme Court, it is *a proper remedial device*, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham". App. at 61a-62a, 106a (emphasis added).

In so holding, the district court cited *Jefferson County*, 28 Fair Empl. Prac. Cas. 1834, in which it had previously approved the consent decree, as well as *Weber*, 443 U.S. 193, *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *aff'd sub nom. United States v. Paradise*, 107 S. Ct. 1053 (1987), and applicable Eleventh Circuit decisions concerning affirmative action. *See* App. at 61a-62a, 65a, 106a-107a, 109a.

even for a temporary period of time" because it "preserve[s] a substantial opportunity for whites and males to be hired or promoted" (App. at 241a-242a), and that

> "[the] provisions for potentially preferential treatment are limited both in time and in effect. They are to expire when the percentage of blacks or women in a particular job approximates the percentage of blacks or women, respectively, in [the] civilian labor force in Jefferson County, Alabama. Additionally, provisions of the settlement provide a mechanism for the decrees to be dissolved after a period of six years". App. at 242a.

In 1985, that court, in this case, held:

> "*Nor are the interests of whites trammeled by the Decree.* Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created".[14] App. at 40a, 85a (emphasis added).

The district court summarized its holdings in this case:

> "In *United States v. Jefferson County, supra*, this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. *Plaintiffs have*

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14 By the time of the trial, eight of the fifteen plaintiffs had received the promotions they sought. R3-359; R11-23-24 to 25; PX 23 at 5-8, 10. And, although this fact is not in the record, petitioners understand that all but three have been promoted to date.

> *demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error.*" App. at 39a, 84a-85a (emphasis added).

The Court of Appeals simply focused on the district court's collateral attack ruling and overlooked the court's rulings that plaintiffs' reverse discrimination claims were meritless and erroneously said that the district court "did not decide the plaintiffs' Title VII and equal protection claims" (App. at 12a). The Court of Appeals's conclusion that plaintiffs did not get their day in court for their reverse discrimination claims is, with all due respect, simply—and inexplicably—wrong.[15]

B. The Instructions by the Court of Appeals to the District Court Conflict with this Court's Decisions in *Johnson* and *Weber*.

The error by the Court of Appeals goes much further than overlooking that the district court had already considered, and rejected, the merits of plaintiffs' collateral attack. Rather than

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15 Not even plaintiffs suggested to the Court of Appeals that the district court did not decide those claims. They acknowledged below that "[a]gain, in its December 1985 Conclusions of Law, the District Court upheld the legality of the Birmingham Consent Decree". Eleventh Circuit Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.* at 53. The holding by the Court of Appeals was not argued to it by the parties nor is it supported by the record. It was simply made out of whole cloth.

simply remanding that issue to the district court, the Court of Appeals purported to construe this Court's decision in *Johnson* "to provide the district court with some guidance". App. at 17a. That construction, however, conflicts with *Johnson* and *Weber*. Specifically, the Court of Appeals instructed that "the district court should subject the consent decrees to ***heightened scrutiny*** under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims" (App. at 20a (emphasis added)), even though neither *Johnson* nor *Weber* ever mentions "heightened scrutiny" under either prong of the analysis.[16]

The majority of the Court of Appeals said that "heightened scrutiny" was required because the "district court's interpretation of the City decree permits the City to make race-conscious promotions without using *any* job-related selection procedure." App. at 19a-20a (emphasis in original). But that is precisely the point of the decrees, just as it was the point of the district court's 1977 order that was affirmed by the Fifth Circuit: race-conscious employment decisions are required because the same selection procedures are used today that were shown in the earlier litigation to have had an adverse impact on blacks and were

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16 Although the words "heightened scrutiny" appear nowhere in this Court's Title VII precedents, the Court of Appeals apparently borrowed those words from this Court's decisions evaluating race-conscious relief under the Equal Protection Clause. *See Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1846 (1986) (plurality opinion); *id.* at 1861 (Marshall, J., dissenting); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3052-53 (1986) (*"Sheet Metal Workers"*) (plurality opinion); *id.* at 3054-55 (Powell, J., concurring). Even in that context, this Court has never suggested that the level of scrutiny applied to one factor of the analysis is heightened relative to the other factors. Rather, this Court has said that the *overall* scrutiny under the Equal Protection Clause in reverse discrimination cases is "heightened" over the rational basis test applied in ordinary cases. The district court correctly rejected the reverse discrimination plaintiffs' claims under the Equal Protection Clause. *See United States v. Paradise*, 107 S. Ct. 1053 (1987) (upholding under the Equal Protection Clause an order that 50% of all promotions be filled with blacks until 25% of the incumbents are black).

never shown to be job related. *See generally Ensley Branch, NAACP*, 13 Empl. Prac. Dec. ¶ 11,504 (1977 order); App. at 242a-245a (approving decrees). As in *Sheet Metal Workers*, the race-conscious relief here is a "compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." 106 S. Ct. at 3037 (plurality opinion).

Moreover, the "heightened scrutiny" standard conflicts with *Johnson*. The Court of Appeals suggested that "heightened scrutiny" is required under the second prong of *Johnson* because the City does not compare the qualifications of competing applicants.[17] Nothing in *Johnson*, however, suggests that the level of scrutiny under the "trammeling" prong of *Weber* depends on whether the employer, after ascertaining that a potential promotee is qualified, compares that candidate's qualifications with those of other candidates.[18] On the contrary, *Weber*, which *Johnson* explicitly adopted, upheld a 50% ratio where there was no such comparison of qualifications. *See Weber*, 443 U.S. at 208; *Johnson*, 107 S. Ct. at 1456. Moreover, in *Johnson* the Court approved an affirmative action plan in which the employer promoted a woman over a slightly more qualified man. *See* 107 S. Ct. at 1448-49.

Accordingly, this Court should grant *certiorari* to correct the Court of Appeals's distortion of this Court's decisions in *Weber* and *Johnson*.

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17 The Court of Appeals's suggestion that candidates' qualifications are not compared also conflicts with the evidence. The Personnel Board does compare qualifications (App. at 42a, 87a)—using selection procedures that tend to exclude blacks—before certifying applicants to the City. Moreover, the extent to which the City independently compares the qualifications of candidates certified to it by the Personnel Board varies among City departments. *Compare* App. at 40a-42a, 85a-86a (Fire Department), *with* App. at 55a-56a, 100a-101a (Engineering Department).

18 The consent decrees expressly call for the promotion only of *qualified* individuals (City Decree ¶¶ 5-10a; App. at 125a-130a; App. at 241a-242a), and under the decrees the City has promoted only persons whom the Personnel Board has certified to be fully qualified for promotion and whom the City did not believe to be unqualified. App. at 31a, 41a-42a, 80a, 86a.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to the Court of Appeals for the Eleventh Circuit to consider the questions presented in this Petition.

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Respectfully submitted,

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